Introducing Varieties of European Subsidiarity

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The Treaty on European Union (TEU) offers a simple rule on the application of the idea of subsidiarity. Article 5 (3) TEU demands that in cases of joint competence between Brussels and the member states, responsibility of any kind should always be allocated to the lowest level possible: local, regional and national action should take priority in line with the criterion of operational efficiency. However, while this definition of subsidiarity provides guidance as a legal principle in favour of decentralised decision-making, it encounters many practical challenges when it comes to implementation. Fundamental questions related to state sovereignty, democratic participation, and political culture make drawing the line over which level of government should have, and does in fact have, decision-making authority in specific cases far more difficult. For this reason, political science and the sub-disciplines of public policy, political economy, political sociology and international relations augment the concept's relevance beyond its foundation in EU law.

To understand the implementation of subsidiarity in European public policy, this collection works with multiple disciplinary perspectives and identifies conceptual variation with the help of empirical case studies and case-specific evaluations. The variation observed in subsequent chapters depends in no small measure on whether subsidiarity concerns have their root cause in the interaction of different forms of political authority, the interpretation of legal doctrine, the need for effective decision-making or the changing nature of governmental preferences. This introduction further spells out why and how the distribution of competences in EU policy making matters. After our interpretation why this aspect was overlooked in the Brexit debate, we conclude with the Commission's latest review of subsidiarity mechanisms.

Sources of variation

From a normative point of view, a first source of variation in the subsidiarity concept is established by the organisational features of a good society. According to Robert Dahl (1990, 70), the demand for decentralisation to a core political unit where people share similar 'aims, feelings, outlooks and ways of doing things' is a fundamental expression of social existence. This is even more obvious if one adds references to a community sharing territorial space, language, and history. In the idea of federalism, for example, it is obvious that

there must be several stages of 'democratic' governments, that 'the people' who are entitled to 'rule' at one stage are a subset of 'the people' who are entitled to 'rule' at a more inclusive stage, and that the rights and obligations of 'the people' at various stages are embodied in a system of mutual guarantees (Dahl 1990, 71-2).

The logical response to the public desire to have a say on matters of individual concern seems to be the organisation of government similar to a set of nested boxes. Whether the issue at hand is soil pollution, a sudden influx of migrants, the prevention of terrorist attacks or trade in endangered species, there is a general expectation of a coordinated response executed by legitimate political authority. Yet, effective decision-making in cases of individual importance will most likely engage stages of government that are less 'democratic' than others. Due to the complexity of policy problems, there is always an element of contingency when trying to find the most appropriate form of

authority. As the process of European integration has repeatedly shown, it could be misleading to see the sovereign nation state as the single, all-purpose problem-solver. Instead, government actors across countries can form a range of associations depending on functional purpose and delegate authority further to administrative bodies.

This said, such behaviour should not lead to excess where a new constitutional arrangement is added with every new problem. Rather, in the spirit of good governance, use should be made of the prevailing task divisions despite a degree of mismatch in the competences held at different levels of a political system. Only at critical junctures, and after careful judgement, the conclusion might be reached that the disadvantages of an imperfect power distribution do outweigh the advantages of a small number of decision-making centres. In the meantime, subsidiarity serves as the pragmatic principle that allows for the regular balancing, adjustment and calibration that is needed in multi-level systems of the federal as well as quasi-federal type. It encompasses the classic set of normative recommendations made by Dahl (1990, 79) for the design of 'authority in a good society':

1. If a matter needs democratic association – choose smallest association that can deal with it satisfactorily.
2. If larger association is considered more satisfactory, consider its extra costs, including a possible increase in the sense of individual powerlessness.
3. The criterion of economy requires that the number of democratic associations in which you participate are few, even if this means that all are too large or too small for some matters.
4. The alternative to larger association may include not only smaller association but also autonomous decisions – for example through the market.

These recommendations are not identical with the legal definition given in Article 5 (3) of the Treaty on European Union (TEU). Here, fundamentally, the applied subsidiarity concept requires that the EU holds the power to legislate in a certain field, i.e. that member states have (voluntarily) transferred this power to the EU. If this is the case, then, according to EU law, two further criteria need to be fulfilled before Brussels can legislate in a certain field. First, a negative condition, in that the objectives of the proposed action cannot be sufficiently achieved by the member states on their own; and, secondly, a positive condition that these objectives can be better achieved at the level of the Union as a whole. In the precise wording of Article 5 (3) TEU:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

In this provision, the specific words 'the objectives of the proposed action' are most important. Only once these objectives are clearly defined, it will be possible to assess whether the member states, or indeed the EU, are in a better position to achieve them. Thus, whatever political actor determines the 'objectives' largely controls the application of the subsidiarity principle in a particular policy area.

Thus, the variation of the applied subsidiarity in legal terms depends crucially on how the EU determines the objectives of the proposed actions. Typically, general objectives are stated in relevant provisions of the EU treaties; and by definition, 'proposed actions' are those proposed by an EU institution. Moreover, the precise objectives of an action are usually given in the preamble of a legislative act, as proposed by the Commission, and, in line with the ordinary legislative procedure, amended and adopted by the Council and the European Parliament (see Articles 289 and 294 TFEU). Therefore, the power to set the objectives of legislative action always remains with the EU institutions as central authorities in policy making. As can be seen from the wording of Article 5 (3) TEU above, the subsidiarity rule refers only to the question as to who is best placed to achieve these objectives, as set by the EU. Furthermore, under Article 5 (3) TEU, the Union shall act only if the objectives of the proposed action can be 'better' achieved at EU level. This condition is closely connected to the previous legal reasoning. As long as the member states are not in a position to achieve the objectives of the 'proposed action', their only option is to turn to the Union.

A third source of variation in the applied subsidiarity concept follows from a focus on the substance of decision-making. On the one hand, decentralised decisions privilege local officials who hold detailed knowledge about the

communities they represent. They are more likely to operate smaller programmes and implement policy measures within given resource limitations. They also have an opportunity to experiment more with policy ideas and identify what works well on a small scale. As a result, decision-making is more responsive to diverse local needs, creating a sense of autonomy and individual liberty among citizens.

Centralised decisions, on the other hand,considerthebroader implications of a common problem. As large-scale projects serve multiple communities, implementation requires more resources and mechanisms of burden-sharing. Central authority has an advantage when spreading standardised best practices across jurisdictions and draws more easily on extended levels of technical expertise. It can also oversee the establishment of uniform legal rights across all subunits of a polity. Thus, by redistributing power resources among smaller jurisdictions equally, decision making by officials at central level can create a sense of fairness among citizens.

In theory, at least, higher levels of political authority have the means to achieve a redistribution among the subunits at lower levels. Reality, however, is more complicated as decisions are heavily influenced by the specific constellation of interests and attitudes among key stakeholders in any area of public policy. Conflicts over the location of decision-making within centralised and decentralised systems can be constructed as a dispute over the precise distributive results these produce (Stone 2012, 368)**.** For example, a quasi-federal system such as the EU–due to its regulatory power – may consistently benefit a different set of people than what would be the case under purely state-centric arrangements. In the same way a federal government is more likely to engage in redistribution than subnational units on their own.

A final source of variation in the applied subsidiarity concept stems from the changing preferences of governments. In response to pressures from economic globalisation, for example, countries react differently through domestic policy changes and adaptations. Depending on the positioning in the global economy, public spending behaviour has often been reactive to the pressures created by economic liberalisation. If central government is unable to attract foreign investments, experiences a financial crisis or is forced to introduce austerity measures, the passing on of government responsibilities (and costs) to local and sub-national entities becomes an appealing strategy (Kahler and Lake 2003, 421). More generally, once subsidiarity is framed in reaction to the diversity and volatility of political preferences, the concern about the level of governance becomes secondary as they find ‘naturally’ their expression at lower or higher levels in line with individual cost-benefit calculations. As a result, there is a constant risk that demands for an upscaling of political decision making to European or international fora will spark a cultural backlash, thus strengthening local, regional and national identities requesting stronger political recognition.

Many factors have the potential to create changes in governmental preferences. Therefore, the substantive reaction in terms of institutional arrangements and regulatory competences will be equally varied. What matters for the analysis presented here is the extent to which new demands are accommodated through democratic procedures ensuring political accountability. It is no coincidence, therefore, that the working of the EU’s early warning system (EWS) as regards subsidiarity breaches is the prime example in the theoretical contribution by Peter Rinderle in chapter one, as well as that of Thilo Marauhn and Daniel Mengeler in chapter two.

EU competences and policy making

The EU is a supranational organisation. This means, inter alia, that EU institutions like the Council, the European Parliament or the Commission are responsible for taking decisions and, if necessary, creating new legal rules which will be binding on EU member states. In institutional terms and as regards its competences in relations with member states, it tries to defend and maintain what has been achieved in terms of organisational power. The competence term is used here to indicate responsibility or authority on part of the EU in an area of public policy.

Paradoxically, its constitutional foundation is not too dissimilar to that of other international organisations. Member states have created the EU, and assigned certain competences to it, by concluding international treaties (TEU, TFEU). The EU can only act where it has been given authority by the member states to achieve objectives set out in the treaties; this is confirmed by the principle of conferral laid down in Article 5 (2) TEU. If, by contrast, an area of competence is not specifically listed in the treaties, it firmly rests in the hands of the member states. Thus, the EU

officially acts only through a single, policy-specific empowerment, and EU law should protect the member states from a hollowing out of their authority. In terms of constitutional design, the member states represent the main political space, whereas the EU performs only secondary tasks delegated by national governments. In this general meaning, subsidiarity is a cornerstone of the very legal construction of the EU.

Once competences have been transferred to the Union, the Council, being the strongest legislative organ of the EU, may still decide not to make use of these competences. In this case, again, member states retain all the power for themselves. Since the Council is composed of representatives of the member states' governments, it is exactly these governments which are fully in control about the extent to which the EU makes use of its powers to legislate. Nobody can force member states' governments, sitting in the Council, to adopt a certain new EU legal act without a qualified majority. Without such approval given by the Council, no legal act can be validly adopted. Accordingly, in a strict legal sense, the matter is simple. If member states, out of subsidiarity concerns or for any other reason, do not want the EU to legislate in a certain field, they just should refrain from transferring this power to the EU. At least, they should oppose proposals in the Council to make use of this power.

Nevertheless, a fundamental dynamic occurs as in the current stage of European integration authority over policy is divided in most areas. In fact, the precise degree to which competences are divided, mixed and shared between the EU and the member states is not crystal clear. Therefore, the selection of chapters in sections two to four – on cohesion policy, social policy, the environment, the area of freedom, security and justice, immigration, as well as external relations and economic policy – try to come to terms with this general ambiguity. Substantive EU policy areas with exclusive competences other than trade policy – competition, customs, fisheries conservation and monetary policy – are not part of the investigation.

As regards policy implementation, the Union has preferred the legal tool of directives rather than regulations to foster the idea of subsidiarity. It is worthwhile to recall that, under Article 288 TFEU, a regulation shall have general application, be binding in its entirety and directly applicable in all member states. In other words, a regulation takes immediate and direct effect throughout Europe. A directive, by contrast, shall be binding on member states as to the result to be achieved, but shall leave to the national authorities the choice of form and methods. Accordingly, directives do not have immediate legal effect for citizens, but need to be transposed into the national law of member states within a certain time period. Both regulations and directives are usually adopted through the EU's ordinary legislative procedure as further specified in Article 294 TFEU. In general, they need the approval of a qualified majority in the Council together with the approval or silence of the European Parliament. Furthermore, in impact assessments, the European Commission provides justifications for EU actions, explains the need for harmonisation and explicitly considers subsidiarity concerns.

Despite this elaborate institutional design, critics, such as the former judge of the German constitutional court (*Bundesverfassungsgericht*), Dieter Grimm**,** consider the attempt to limit the transfer of competences to the EU with the help of subsidiarity mechanisms as a failure. For him, uncertainty continues as to whether policy areas are located inside or outside the sphere of EU power. In particular, he is concerned about the very few court cases adjudicating whether the principle has been breached or not (Grimm 2016, 194). While there is much less dispute over the usefulness of subsidiarity as a guiding principle for policy development in federal and quasi-federal systems (as highlighted in the case study by Maximilian Bossdorf on export and investment promotion agencies in chapter 14), it appears useless as a yardstick for decision-making when there is an actual conflict over the distribution of competences between member states and EU institutions (Grimm 2016, 23).

Once an act is legally adopted in the Council, the member states have confirmed – at least by qualified majority – that the EU is in a comparatively better position to achieve the stated objectives of legislation. In other words, member states want the EU to act. In such circumstances, it is logically difficult to argue that member states are still better placed to achieve the legislative objectives. Accordingly, there is hardly any room for successful legal challenges of adopted EU rules based on Article 5 (3) TEU. It is thus not surprising that the review process carried out by the European Court of Justice is very limited, and that the latter has never invalidated an existing EU law on grounds of subsidiarity (Craig and de Búrca 2015, 100). Once a government is outvoted in the Council, there is little chance to find redress in the court system.

Typically, the critique from the left and right of the political spectrum has identified a step-by-step depletion of member state competences due to the EU's overarching goal to establish and maintain a common market. Potentially, almost any member state norm or domestic piece of legislation can be interpreted as constituting a barrier to free market forces**.** For this reason, the interpretation of Article 5 (3) TEU – and the starting point of many contributions to this volume – may amount to a political and economic, rather than purely legal, question. The EU's functionalist logic of political integration with the help of integrated markets establishes a strong presumption that policy objectives can be 'better achieved' at the supranational level. The case of environmental policy, presented by Sian Affolter in chapter six, shows that this does even include politically motivated non-action by the EU itself.

Most of the time, EU actions envisage multiple objectives, and some of these may or may not require supranational measures. Given the challenging task to balance appropriately EU goals with those under the control of national authorities, a multidisciplinary approach suggests itself. The findings of individual chapters in this volume highlight that political and economic assessments sit not always comfortably with judicial procedures. The formulation and implementation of EU sectoral policies, as analysed in sections two and three of this volume, show the variety in which legal reasoning has dealt with complex market conditions and diverging political forces.

Another prominent critic, Claus Offe (2014, 67-8), identifies a 'deceptive' aspect in the 'subsidiarity tale' because of the 'fictitious nature of sovereignty claims' by the member states. For him, these stand in the way of a genuine revival of the Union's social dimension in response to the European financial crisis. The forces of economic liberalism have already undercut the capacity of nation states to regulate, protect, and intervene in social and political affairs in line with democratically established standards of rights and legal obligations. Regardless of the legal recognition of the subsidiarity principle, the factual balance that has been built over decades between the market and the state has shifted in favour of the former and challenges the conduct of democratic politics oriented towards social integration. Moreover, the lack of an independent EU budgetary authority or budget rights comparable to those of domestic legislative institutions prevents progress towards a European social security policy. As it stands, the EU does not control the necessary resources to conduct its own re-distributional policy (Offe 2016, 176-7).

Then, as Barrie Hebb argues by looking into the evolution of Canadian federalism in chapter 15, a purely legal definition of subsidiarity is less meaningful since each decision-making level must be able to raise adequate revenues to cover the expenses involved in carrying out the decisions it has the formal power and authority to make. Similarly, Rosa Mulé notes in chapter five the emptiness of the subsidiarity principle because eligibility for EU financial support has often been linked to strict conditions. Yet, she also sees the potential of innovative solution as the proclamation of the European Pillar of Social Rights (EPSR) asks for a more balanced approach to national and supranational activities in the social domain. Historically, the subsidiarity principle and attempts at European economic governance are not a contradiction in terms. Although EU cohesion policy might need to simplify expenditure rules in common funding arrangements, Giuliana Laschi is able to highlight in chapter four the truly transformative capacity of European institutions. Through the reform of financial allocations and funding access, the policy area has gradually morphed into one of the most important EU activities, now directing the highest percentage of budgetary resources.

Subsidiarity and Brexit

EU institutions are required to respect national identities while being further constrained by the principle of subsidiarity and the principle of proportionality. Why, then, did subsidiarity arguments not gain further prominence in the Brexit debate? Many, for example, saw immigration as a key issue around which the leave campaign did revolve. Indeed, as section three of this book and individual chapters by Marco Borraccetti, Ralf Alleweldt, Marco Balboni and Jörg Dürrschmidt indicate, subsidiarity has a major contribution to make to understand the EU's complex response in this specific policy area. Moreover, the chapters by Hartmut Aden and Günter Walzenbach in sections two and four extend the analysis to establish further linkages with other key policy aspects of Brexit, such as internal security cooperation and global trade negotiations.

From the subsidiarity angle, it is not surprising that individuals with exclusive British, English, Welsh or Scottish identities tend to be more Eurosceptic than individuals who embrace the notion of a 'nested identity'. Apparently, the

number of people who claim to hold such a multiple English-British-European identity has declined since the formal introduction of the subsidiarity principle by the Maastricht Treaty (Taylor 2017, 49). Furthermore, without affinity to European subsidiarity, the devolution of Scotland, Wales and Northern Ireland was mainly interpreted as the hollowing out of the British state rather than as a step towards democratic reform and the successful accommodation of sub-nationalisms within the UK. Without a culturally embedded notion of subsidiarity, remain campaigners had a difficult stance to make a convincing argument for EU membership by bringing across the idea that Brussels does practise self-restraint in terms of power transfers from the member states.

Of course, in terms of substance, central elements of the subsidiarity concept are not alien to the UK's territorial power structure. In fact, standard arguments for devolution have emphasised opportunities for innovation, policy effectiveness and improved accountability once decisions are taken closer to those most affected by them. In the words of the Kilbrandon report (Royal Commission 1973, 165), those who hold transferred powers should 'have some measure of independence, permitting them to do things in their own ways which may not always have the support of the central government'.

Similarly, the functional idea of a policy laboratory facilitating policy learning at the local level has been equally applied to devolved government in the UK. Whether this applies in the same way in a post-Brexit scenario is another question. If no appropriate balancing mechanism between the powers of central government and devolved entities is found, the break-up of the UK's territorial settlement could be a step closer (Bogdanor 2019).

The Brexit saga is an intriguing example of how government preferences can change. It also shows a continuing dilemma about the location of appropriate levels of decision-making. While the anticipated repatriation of EU competences should fulfil the promise 'that returning powers sit closer to the people of the United Kingdom than ever before', it is far less clear whether 'the outcome of the Brexit process will be a significant increase in the decision-making power of each devolved administration' (Greer 2018, 136). The fundamental question about the distribution of competences – equally relevant in the EU – is not going away. In fact, the analogy can be pushed further. Despite the absence of the subsidiarity debate in the UK, the emerging post-Brexit arrangements with Northern Ireland, Scotland and Wales may justify the 'quasi-federal' label usually reserved for the EU's system of multi-level governance.

Frequently, leading politicians of the centre-left and right did approach the UK-EU relationship in terms of red lines, opt-outs, and exceptions to defend national interests in negotiations with Brussels. In the British case, EU engagement was heavily contingent on the priorities of the domestic policy agenda and concerns about the precise way through which economic interdependence could compromise political sovereignty (Gifford 2010, 326). Against this background, it is less surprising that the British public never embraced the idea of Europe. Not only is there a lack of emotional empathy with the idea of integration, but there is also much less acceptance of the EU as a legitimate locus of decision-making with direct policy impact. Instead, popular stereotypes run down the argument according to which Brussels is 'meddling' with Britain's internal affairs.

Already for Margaret Thatcher the Maastricht Treaty and its federalist agenda augmented German power rather than contained it (Wellings 2010, 496). Thus, the abstract principle of subsidiarity became part of the problem rather than a solution. The remnants of this theme continued to motivate hard-line Eurosceptics in the House of Commons from the early 1990s up to the aftermath of the Brexit vote in June 2016. In their view, a balance of power approach would be the only way forward to contain Germany's dominant role in the EU.

Is it possible, however, to tie the EU's principle of subsidiarity to a specific national interest? According to Paul Lever (2017, 95) former British ambassador in Berlin, 'Germans are proud of the F-word', whereas 'for many people in Britain, including many British Euro-parliamentarians, the workings of the EU seem alien and bizarre'. It seems, for example, no coincidence that many senior positions – including the Commission presidency – are held by officials who see EU politics as a 'natural extension' of the domestic political process. As power structures in Brussels resemble those in Germany, the EU appears to be 'familiar political territory' (Lever 2017, 98).

In contrast to the UK experience, the principle of subsidiarity has assumed greater importance in the domestic

politics of Germany after unification. In particular, the state government of Bavaria argued in favour of stronger recognition when new *Länder* joined the federation in the 1990s. Such demands articulated at sub-national levels reached Brussels resulting in the principle's codification at Maastricht (Bulmer and Paterson 2019, 47). In turn, the German Basic Law (*Grundgesetz*) introduced a new Article 23 following a constitutional amendment:

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.

Despite the diverging development paths in the UK and Germany, Protocol no. 1 on the role of national parliaments in the EU and Protocol no. 2 on the application of the principles of subsidiarity and proportionality could have formed a useful corrective to any perceived or actual imbalance. Both protocols are an integral part of the TEU and empower all national parliaments to submit opinions for further consideration by Brussels. Moreover, all national parliaments are entitled to initiate infringement proceedings with the European Court of Justice if they want to improve on the effectiveness of their control mechanisms (Article 5 TEU; Protocol no. 2, Article 8).

The Timmermans report

All said, subsidiarity must play an important role in the legislative procedure of the EU. Based on Article 5 (3) TEU, representatives of member states in the Council and their parliaments may defend national powers against an envisaged EU intrusion. European institutions – in particular, the Commission – are under pressure to justify why certain powers should be exercised by the EU at all. If they fail to convince governments about the need for EU action, and despite formal powers, a serious implementation deficit can arise.

In his State of the Union address of September 2017, then Commission President Jean-Claude Juncker set out his vision for the EU in 2025. He continued the debate launched in the White Paper on the Future of Europe and singled out one key option – 'to do less more efficiently'. While it makes sense for the EU to step up its work on certain issues, it equally should consider doing less in others; especially when it is unable to deliver on its own promises. As a result, a task force met under the leadership of the Commission's first Vice-President, Frans Timmermans, exploring a range of policy areas where activities could be either devolved or returned to the member states after thoroughly engaging with regional and local authorities.

The final report formed a collective effort overseen by three members of the European Committee of the Regions (CoR), three members from national parliaments, and one member of the European Commission. The European Parliament, entitled to nominate three members, preferred to not get involved. Overall, there were 41 national parliamentary chambers, 74 regional legislative assemblies as well as 280 regions and 80 000 local authorities entitled to contribute to the formal deliberations of the EU task force. Its mandate comprised three main objectives following on from the given guidance that 'the Commission must be big on the big things and act only where it can achieve better results than Member States acting alone' (European Commission 2018a):

- a better application of subsidiarity and proportionality in the work of EU institutions as related to the implementation of policies and legislation;
- the identification of policy areas where decision-making and policy implementation can be re-delegated orreturned to the member states;
- and the search for ways to better involveregional and local authorities in the preparation and follow up of Union policies.

In its conclusion, the final report confirmed the added value of EU action when addressing new policy challenges in areas such as security, defence and migration, despite the need to intensify interventions as regards climate change (European Commission 2018b, 4). What is more, in recognition of resource limitations and efficiency criteria, priority was given to procedural changes in the interactions between Brussels and the member states rather than to the international dimension of policy areas. This relative neglect of the latter confirms the assessment of European

foreign policy made by Jörg Michael Dostal in chapter 12.

The review of the principles of subsidiarity and proportionality focussed mainly on internal working arrangements to improve the EU's policy making process. To this end, it proposed the term 'active subsidiarity,' suggesting a common understanding among local and regional authorities (as well as national parliaments) to facilitate the genuine ownership of EU policies across governance levels. Essentially, the Timmermans report culminates in a new elaborate grid for a common administrative method by which all decision makers should assess subsidiarity and its proportional use. In other words, it constitutes a bureaucratic response to the desire to have a more systematic review of the two principles in draft legislation and cases of amendment. The model template, for example, focuses on the what, why and how of EU actions in 25 sub-questions concerning the legal foundations, formal competences, and procedural safeguards of EU actions (European Commission 2018b, 32-4).

The proposed reform steps include existing legislation as well as new policy initiatives undergoing closer scrutiny with the possibility of repeal. In fact, the final document recognised the common critique of EU legislation becoming too dense or complex as EU directives impose limits on decision-making spaces at state and sub-state level without the flexibility to accommodate national priorities. For the time being, however, the report confirmed the value-added deriving from all current EU policy areas. The extensive consultation process could not find substantive treaty competences where a definite re-delegation to the member states – 'in whole or in part' – would make sense.

Several proposals discussed by the task force were discarded as they would require a treaty change, for example, as regards modifications to the parliamentary control mechanisms of subsidiarity. However, as Donatella Viola highlights in chapter three, effective scrutiny may be achieved even without revised review mechanisms, if the multitude of actors in national and European legislatures are willing and able to create synergies through dialogue and deliberation.

Easier to implement are reforms within the existing legislative process of the EU. The report points here to more targeted consultations with local and regional authorities. The CoR, for example has conducted over 200 citizen's dialogues on the future of Europe in all member states reaching out to over 30, 000 citizens. Furthermore, it suggests a revision of the Commission's 'Better Regulation Guidance' to engage more directly with sub-national entities when these have concerns about the impact of new legislation. Although legislative proposals by the Commission generally come with impact assessments exploring the costs and benefits of alternative policy options in the light of subsidiarity, these could have a stronger focus on territorial implications and a more explicit recognition of the EU's value-added.

What is the best way to ensure that common policies will be implemented across the Union to an adequate standard? The current system has led to a high level of legislative detail and prescription, especially when it comes to the substance of directives. This outcome reveals a fundamental trade-off. On the one hand, the creation of a level-playing field for the efficient working of the internal market requires compliance with Union legislation throughout all member states. On the other hand, detailed and prescriptive EU laws limit the flexibility of regional authorities and local actors. Of course, standard legal acts of the EU can be changed and improved to reduce the burden of the latter, but as the structure of this book suggests, this is best done on a case-by-case basis.

Conclusion

The question of how powers should be distributed between the EU and the member states is not, or only to a minimal extent, answered by Article 5 (3) TEU. This question is mainly decided in negotiations between member states on treaty amendments and in legislative deliberations between member states' governments in the Council. It is obviously an eminently political question that depends on regular feedback from local, regional and national actors. Fundamentally, it cannot be answered by applying legal rules alone. Instead, it requires an empirical investigation into the practical application of subsidiarity from the perspective of multiple disciplines.

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